

1 Stephen M. Doniger (SBN 179314)
2 stephen@donigerlawfirm.com
3 Scott Alan Burroughs (SBN 235718)
4 scott@donigerlawfirm.com
5 Trevor W. Barrett (SBN 287174)
6 tbarrett@donigerlawfirm.com
7 Kelsey M. Schultz (SBN 301494)
8 kschultz@donigerlawfirm.com
9 DONIGER / BURROUGHS
10 603 Rose Avenue
11 Venice, California 90291
12 Telephone: (310) 590-1820

13 Attorneys for Plaintiff

14
15 **UNITED STATES DISTRICT COURT**
16 **CENTRAL DISTRICT OF CALIFORNIA**

17 Design Collection, INC., a California
18 corporation,

19 Plaintiff,

20 vs.

21 ZOETOP BUSINESS CO., LTD.,
22 individually and doing business as
23 “SHEIN”, a Hong Kong private limited
24 company; SHEIN DISTRIBUTION
25 CORP., a Delaware corporation; and
DOES 1-10,

Defendants.

Case No.: 2:22-cv-05166-PA-JEM
Hon. Judge Percy Anderson

JOINT RULE 26(f) REPORT

Date: November 21, 2022
Time: 10:30 a.m.
Courtroom: 9A, 9th Floor

1 By and through their attorneys of record, who are set forth below, the parties
2 have prepared and hereby submit this jointly signed Scheduling Conference report
3 following the conference of counsel required by Federal Rule of Civil Procedures
4 16(b) and 26(f), Central District Local Rule 26-1 and this Court's Order setting a
5 Scheduling Conference.

6 **A. STATEMENT OF THE CASE**

7 Plaintiff's Contentions

8 Plaintiff Design Collection, Inc. is a Los Angeles-based textiles company.
9 As part of its business practices, it creates or purchases the exclusive rights to two-
10 dimensional works of art and files and receives copyright registrations for these
11 works. This case concerns Defendants' infringement of two such designs—DC-
12 12143 (“Subject Design A”) and DC-1963 (“Subject Design B”). Specifically, the
13 Complaint alleges that Defendants sold fabric and/or garments bearing
14 unauthorized reproductions and/or derivative works that infringe upon the Subject
15 Designs.

16 Plaintiff estimates that recoverable damages, including without limitation
17 Defendants' disgorgable profits, Plaintiff's actual damages, attorneys' costs, and
18 pre-judgment interest on its copyright claim are likely in excess of \$100,000.00.
19 Plaintiff may alternately elect statutory damages, which would amount to up to
20 \$150,000 per instance of infringement.

21 Defendants' Contentions

22 Defendants dispute all of Plaintiff's material allegations. Defendants contend
23 that the accused products are not substantially similar to the designs at issue, let
24 alone virtually identical; Plaintiff will therefore be unable to prove copying as a
25 matter of law. Defendants further contend that any damages attributable to the
26 alleged infringement are far less than the estimate provided by Plaintiff and that, if
27 Plaintiff elects to recover statutory damages, such statutory damages would be
28 minimal as Plaintiff will be unable to prove willfulness. Defendants have also

1 pleaded numerous affirmative defenses, including independent creation and
2 implied license.

3 **B. SUBJECT MATTER JURISDICTION**

4 This action arises under the Copyright Act of 1976, Title 17 U.S.C. § 101 *et*
5 *seq.* Accordingly, this Court has federal question jurisdiction under 28 U.S.C.
6 §§ 1331 and 1338(a).

7 **C. LEGAL ISSUES**

8 Plaintiff's Contentions

9 The legal issues in this case involve Plaintiff's ownership of the copyright in the Subject
10 Design and Defendants' infringement thereof, including Defendants' access to the Subject
11 Design and the substantial similarities between the Subject Design and the designs of the
12 Subject Products. Legal issues concerning heightened damages for willful infringement are
13 also present.

14 Defendants' Contentions

15 Defendants concur with Plaintiff's summary of the legal issues.

16 **D. DAMAGES**

17 Plaintiff's Contentions

18 Pursuant to 17 U.S.C. § 501 *et seq.*, Plaintiff is entitled to damages resulting
19 from its (1) actual damages, (2) any additional profits realized by the Defendants,
20 and (3) any further economic advantage realized by the Defendants through their
21 infringement.

22 Plaintiff was denied profits it would have realized had it been lawfully hired
23 to print the infringing fabric. Plaintiff will calculate lost profits damages after
24 discovery.

25 Defendants' Contentions

26 If liability were otherwise established, Defendants estimate that plaintiff's
27 own "actual damages" would be zero. Which is to say that plaintiffs in cases like
28 this one are often unable to demonstrate that defendants' alleged infringement

1 caused the plaintiff any demonstrable direct harm whatsoever.

2 Which is why plaintiffs in cases like this one typically seek *disgorgement* of
3 the *defendant's* profits “that are *attributable to the infringement*” (see 17 U.S.C. §
4 504(b)(1)) (emphasis added). In garment cases like this one, most of a defendant's
5 profits are *not* going to be “attributable to the infringement”. Which is to say the
6 profits were earned not because there was allegedly infringing artwork on the
7 garment, but because the garment had a nice silhouette, the fabric was desirable,
8 the color was on trend, the price point was right, the marketing was effective, etc.
9 Thus, the portion of a defendant's products “attributable to the infringement” are
10 typically a small slice of the defendant's total profits on any allegedly infringing
11 garment.

12 Alternatively, and assuming timely and valid registration, a plaintiff may
13 elect to recover statutory damages, instead of seeking disgorgement of the
14 defendant's profits or actual damages. Defendants contend that statutory damages
15 in this case could be as low as \$1,500 (for non-willful infringement), or even \$400
16 (for innocent infringement).

17 Defendants contend that the Copyright Act does not provide for the recovery
18 of “further economic advantage realized by the Defendants through their
19 infringement.”

20 **E. PARTIES, EVIDENCE, etc.**

21 Plaintiff's Contentions

22 The parties are Plaintiff Design Collection, Inc. and Defendants Zoetop
23 Business Co., Ltd.; Shein Distribution Corp.; and Doe Defendants.

24 Should Defendants reveal in Initial Disclosures or discovery responses any
25 garment manufacturers, vendors, or suppliers involved in the chain of alleged
26 infringement of Plaintiff's Subject Design, Plaintiff will move to add such entities
27 as parties to this action in place of Doe Defendants.

1 Plaintiff has no parents, subsidiaries, or affiliates that are implicated in this
2 litigation.

3 Defendants' Contentions

4 Percipient witnesses that Defendants intend to seek testimony or documents
5 from include: (1) the actual designer(s) of each of Plaintiff's claimed registered
6 works; (2) people involved in printing, milling, or manufacturing Plaintiff's
7 designs, including, especially, any mills or third-party trading companies that
8 Plaintiff provided its designs to, so that the designs could be printed onto fabric in
9 China; (3) individuals, whether employed by Plaintiff or who work for Plaintiff's
10 customers or suppliers, with direct knowledge of how Plaintiff typically values its
11 artwork; (4) Plaintiff's owner or other principal; (5) a corporate representative of
12 Plaintiff; and (6) witnesses employed by or who represent Defendants.

13 Relevant documents and things that will be sought in discovery include: (1) the *exact* “deposit copy” that was submitted to the Library of Congress as part of
14 Plaintiff's copyright registration application, for each of the copyright(s)-in-suit,
15 and other documentation related to the application and registration of Plaintiff's
16 works; (2) documents and other things from the actual designer(s) of Plaintiff's
17 claimed registered works, evidencing who purportedly created something original,
18 when, and how they did so; (3) documents and other things from people involved
19 in printing, milling, or manufacturing Plaintiff's designs, including, especially, any
20 mills or third-party trading companies that Plaintiff provided its designs to, so that
21 the designs could be printed onto fabric in China; (4) documents and other things
22 from individuals, whether employed by Plaintiff or who work for Plaintiff's
23 customers or suppliers, with direct knowledge of how Plaintiff typically values its
24 artwork; and (5) other documents from Plaintiff that relate to proving copying or
25 access, and to proving damages.

26
27
28

1 **F. INSURANCE**

2 Plaintiff does not have insurance coverage for the claims at issue.

3 Defendants are not aware of any insurance that would cover the claims at
4 issue.

5 **G. MANUAL FOR COMPLEX LITIGATION**

6 The parties do not believe the manual for complex litigation will be
7 necessary for this action.

8 **H. MOTIONS**

9 Plaintiff's Contentions

10 Plaintiff may wish to move to add additional defendant should discovery
11 reveal the involvement of currently unknown parties in the chain of infringement
12 of Plaintiff's proprietary designs. It is likely an initial round of discovery will need
13 to be obtained in order to discern the identities of these Defendants.

14 Defendants' Contentions

15 In the event that material errors are found in any of Plaintiff's copyright
16 registration applications, it is possible that Defendants would make a motion
17 pursuant to 17 U.S.C. § 411(b)(2), which provides that in certain circumstances
18 "the court shall request the Register of Copyrights to advise the court whether the
19 inaccurate information, if known, would have caused the Register of Copyrights to
20 refuse registration."

21 Another non-dispositive motion that Defendants may bring would be one to
22 obtain testimony from Plaintiff's designer of the works at issue, if that designer
23 resides out of the United States and if Plaintiff refuses to produce him or her
24 voluntarily.

25 **I. DISPOSITIVE MOTIONS**

26 Plaintiff's Contentions

27 Plaintiff anticipates filing a Motion for Partial Summary Judgment for
28 Liability as to Defendants for copyright infringement by the deadline for

1 dispositive motions.

2 Defendants' Contentions

3 Defendants anticipate filing a motion for summary judgment challenging
4 substantial similarity, in which they argue that Plaintiff cannot meet the Ninth
5 Circuit's "extrinsic test" for substantial similarity. Depending on how promptly
6 and appropriately Plaintiff answers interrogatories articulating *exactly what* it is
7 claiming as original authorship, and providing related documents, this motion
8 could be brought well before the close of fact discovery.

9 **J. CHANGES UNDER RULE 26(a)**

10 The Parties do not believe that any changes should be made in the timing,
11 form, or requirement for disclosures under Rule 26(a). The Parties will exchange
12 initial disclosures on or before December 5, 2022, in accordance with Rule
13 26(a)(1).

14 **K. DISCOVERY PLAN**

15 The parties anticipate using all discovery allowed under the Federal Rules, including
16 depositions, requests for documents, interrogatories and requests for admissions, and
17 potentially entering into an appropriate stipulated protective order.

18 The parties reserve all objections to discovery propounded even if the
19 subject matter is identified below. Further, the parties reserve all rights to seek
20 discovery outside of the subject matter identified below.

21 The parties agree to meet and confer over electronic discovery issues at the
22 time any such disputes arise, including the form or production of electronic
23 information and scope of any such electronic discovery. The parties also anticipate
24 that each party (or a corporate representative thereof), as well as third parties, will
25 need to be deposed, and that said depositions shall take place after an initial round
26 of written discovery. The parties anticipate these depositions being taken during
27 the discovery period.

28 The parties agree to stipulate to and file a protective order regarding the

1 disclosure of confidential information and documents in discovery.

2 *See Proposed Dates below for applicable discovery deadlines.*

3 **Plaintiff's Contentions as to Subject Matter of Discovery**

4 Plaintiff anticipates seeking sales and distribution information, including
5 without limitation information concerning sales receipts, store-by-store asset
6 allocation, profits attributable to the product at issue, as well as the development
7 and authorship of the accused designs at issue.

8 **Defendants' Contentions**

9 Defendants anticipate using the discovery mechanisms allowed under the
10 Federal Rules and entering into an appropriate stipulated protective order, and
11 investigating all of the witnesses and subjects discussed above in Section (E).

12 Defendants do not anticipate that this is a case involving significant ESI
13 issues, at least with respect to what they intend to request from Plaintiff or what
14 they think it would appropriate for Plaintiff to request from Defendants.

15 Defendants' main concern with respect to discovery issues that might affect
16 case timing is that it is possible that this case could involve needing to take
17 testimony from witnesses who reside overseas, and who Plaintiff may be unable or
18 unwilling to produce voluntarily, such as the designer(s) of the copyrights in suit,
19 who often reside in Europe and Asia and may or may not work for the Plaintiff
20 company.

21 **L. EXPERT DISCOVERY**

22 *See Proposed Dates below for applicable expert discovery deadlines.*

23 **M. SETTLEMENT EFFORTS AND ALTERNATE DISPUTE RESOLUTION**

24 The Parties are amendable to using Central District Settlement Procedure No. 2
25 under Local Rule 16-15.4.

26 **N. TRIAL ESTIMATE**

27 Plaintiff and Defendants have each requested a jury trial. The parties estimate
28 the trial in this matter to last **between 2-3 court days.**

O. TRIAL COUNSEL

Plaintiff's Trial Counsel: Stephen M. Doniger, Trevor W. Barrett, and Kelsey M. Schultz.

Defendants' Trial Counsel: Morgan E. Pietz (lead), Cyrus E. Shahriari, and Thomas P. Burke Jr.

P. MAGISTRATE JUDGE

The Parties do not stipulate to the use of a magistrate judge unless specifically required under the applicable local rules.

Q. INDEPENDENT EXPERT OR MASTER

The parties presently do not believe this case requires the Court to appoint a master pursuant to Rule 53 or an independent scientific expert.

R. EXPERT WITNESSES

Plaintiff's Contentions

Plaintiff has not yet determined if it will utilize an expert witness in this case.

Defendants' Contentions

Defendants may engage expert witnesses to opine on substantial similarity and attributable profits and deductible costs.

S. SCHEDULE WORKSHEET

See Proposed Dates below for applicable pretrial and trial dates.

T. CLASS ACTIONS

The Parties presently do not believe this case qualifies under a class action suit.

U. OTHER ISSUES

The Parties do not contemplate that any other issues will affect or complicate the status or management of this case.

1111

111

111

1 **V. PROPOSED DATES**

| | |
|---|-------------------|
| 2 Trial: | October 24, 2023 |
| 4 Pretrial conference: | October 9 2023 |
| 6 Last day to add claims or parties: | April 17, 2023 |
| 8 Last Day to File Motions: | August 14, 2023 |
| 9 Fact Discovery cut-off: | July 5, 2023 |
| 10 Opening Expert Disclosures: | May 1, 2023 |
| 11 Expert Rebuttal Disclosure: | May 29, 2023 |
| 12 Expert Discovery cut-off: | May 29, 2023 |
| 13 Settlement conference cut-off: | September 4, 2023 |

15
16 WHEREUPON, the parties, by and through their respective attorneys of record,
17 hereby jointly submit this Joint Report.

18 Respectfully submitted,

19 Dated: November 7, 2022

20 By: /s/ Kelsey M. Schultz
21 Trevor W. Barrett, Esq.
22 Kelsey M. Schultz, Esq.
23 DONIGER /BURROUGHS
24 Attorneys for Plaintiff
25 Design Collection, Inc.

26 Dated: November 7, 2022

27 By: /s/ Morgan E. Pietz
28 Morgan E. Pietz
 Cyrus E. Shahriari
 Thomas P. Burke, Jr.
 Attorneys for Defendants

1 The undersigned attests that all signatories listed, and on whose behalf this
2 filing is submitted, concur in the filing's content and have authorized the filing.

3
4 Dated: November 7, 2022

5
6 By: /s/ Kelsey M. Schultz
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28